

**IN THE SUPREME COURT**

**STATE OF ARIZONA**

STATE OF ARIZONA	)	Arizona Supreme Court No.
	)	CV 12-0319-PR
Plaintiff/Petitioner,	)	
	)	Court of Appeals, Division Two
vs.	)	2 CA-CV 2011-0197
	)	
JOSEPH COOPERMAN,	)	Pima County Superior Court No.
	)	CR 2011-7903
Defendant/Respondent.	)	
	)	Tucson City Court No.
	)	TR 10061595
	)	
	)	
	)	

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***AMICUS CURIAE* BRIEF OF  
THE ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL  
IN SUPPORT OF PETITIONER, STATE OF ARIZONA**

ELIZABETH ORTIZ, #012838  
Executive Director  
FAITH C. KLEPPER, #018444  
Arizona Prosecuting Attorneys'  
Advisory Council  
1951 West Camelback Road, Suite 202  
Phoenix, Arizona 85015-3407  
(602) 542-7222 / FAX (602) 274-4215  
Elizabeth.Ortiz@apaac.az.gov  
Attorneys for Amicus Curiae

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## I. INTRODUCTION

The Arizona Prosecuting Attorneys' Advisory Council (APAAC) is a state agency established pursuant to A.R.S. § 41-1830 *et seq.* and therefore, need not submit a motion for leave to file an amicus brief pursuant to Rule 16(a), Ariz. R. Civ. App. APAAC represents more than 800 state, county, and municipal prosecutors. APAAC's primary mission is to provide training to Arizona's prosecutors. APAAC also provides a variety of other services to and on behalf of prosecutors. For instance, APAAC acts as a liaison for prosecutors with the legislature and the courts. In this role, APAAC may advocate prosecutorial interests before the legislature or proposes changes to this Court's procedural rules. On occasion, APAAC submits amicus curiae briefs in state or federal appellate courts on issues of significant concern. This is one of those occasions.

The Navajo County Attorney's Office correctly noted that over 18,000 DUI arrests occur every year in Arizona and are tried in numerous municipal and county courts. Navajo County Attorney's Office *Amicus Curiae* Brief in Support of the State's Petition for Review at 16, citing Ariz. Governor's Office of Highway Safety, *State of Arizona Annual Performance Report: Federal Fiscal Year 2011*. As noted in detail below, the Court of Appeals' decision in *State v. Cooperman*, 230 Ariz. 245, 282 P.3d 446 (App. 2012), will substantially affect the manner in which DUI cases will be prosecuted, including an increase in the length and cost of

misdemeanor and felony DUI trials and the preparation thereof. This will put an unnecessary strain on the scarce resources of the criminal justice system. For those reasons, APAAC joins with the petitioner in asking this Court to accept jurisdiction of the pending petition for review to resolve this matter of statewide importance.

## **II. ARGUMENT**

### **A. The Court of Appeals' decision incorrectly interprets the presumption of impairment set forth in A.R.S. § 28-1381(G).**

In its decision interpreting A.R.S. § 28-1381(G), the Court of Appeals held that the presumption of intoxication must be given “whenever the state introduces evidence that a defendant had an alcohol concentration of 0.08 or more.”

*Cooperman*, 230 Ariz. at ¶ 18, 282 P.3d 446. The Court’s interpretation of the statute violates the rules of statutory construction.

#### **1. The Court of Appeals failed to interpret the plain language of A.R.S. § 28-1381(G) as a whole.**

When reviewing statutes, the court must apply “fundamental principles of statutory construction, the cornerstone of which is the rule that the best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction.” *State v. Hansen*, 215 Ariz. 287, 289, 160 P.3d 166, 168 (2007) (internal citations omitted).

Applying a “practical and commonsensical construction” to the interpretation of words ensures predictability by deterring speculation over the meaning of

commonly used terms. *See Cochise County v. Faria*, 221 Ariz. 619, 622, 212 P.3d 957, 960 (App. 2009).

The preliminary paragraph of A.R.S. § 28-1381(G) provides that a defendant's alcohol concentration "gives rise" to certain presumptions. *Cooperman*, 230 Ariz. at ¶ 17, 282 P.3d 446. From this language alone, the Court of Appeals found that the presumptions are mandatory. *Id.* This holding ignores the language of subsections (G)(1), (G)(2), and (G)(3). Subsection (G)(1) states that a defendant with an alcohol concentration less than 0.05 "*may* be presumed" not to be under the influence of intoxicating liquor. A.R.S. § 28-1381(G)(1) (emphasis added). Similarly, if a defendant has an alcohol concentration greater than 0.08, he or she "*may* be presumed" to be under the influence of intoxicating liquor. A.R.S. § 28-1381(G)(3) (emphasis added). However, subsection (G)(2) provides that an alcohol concentration between 0.05 and 0.08 "*shall* not give rise to a presumption." A.R.S. § 28-1381(G)(2) (emphasis added). Although virtually ignored by the Court of Appeals, the fact that the three subsection of A.R.S. § 28-1381(G) use different verbs to set forth a presumption (or lack thereof) is significant to a determination of the legislative intent in the overall statutory scheme.

**2. The plain language of A.R.S. § 28-1381(G)(3) sets forth an optional presumption of impairment.**

In statutory interpretation, "the use of the word 'may' generally indicates a permissive provision; in contrast, the use of the word 'shall' typically indicates a

mandatory provision.” *State v. Lewis*, 224 Ariz. 512, 515, 233 P.3d 625, 628 (App. 2012), citing *State v. Seyrafi*, 201 Ariz. 147, 150, ¶ 14, 32 P.3d 430, 433 (App. 2001). “A failure to follow a discretionary provision has no invalidating consequence.” *Lewis*, 224 Ariz. at 515, 233 P.3d at 628, citing *Way v. State*, 205 Ariz. 149, 152, ¶ 9, 67 P.3d 1232, 1235 (App. 2003). Courts may depart from permissive provisions without violating their statutory grant of authority. *Id.*

The use of the word “may” in A.R.S. § 28-1381(G) (3) means that the presumption of impairment is permissive.<sup>1</sup> Consequently, because the presumption is not mandatory, it must be specifically invoked. Conversely, the use of the word “shall” in subsection (G)(2) means that no presumption is permitted. To imply that the language in all three subsections of § 28-1381(G) is mandatory renders the subsequent language either redundant [§ 28-1381(G)(2)] or contradictory [§ 28-1381(G)(1),(3)].

**3. A permissive presumption is not a fundamental principle of law on which the trial court must instruct the jury.**

To add to the confusion, the Court of Appeals later acknowledged that “the presumption contained in § 28-1381(G) is permissive.” *Cooperman*, 230 Ariz. at ¶

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<sup>1</sup> Compare California’s presumption statute: “the amount of alcohol [concentration] *shall* give rise to the following presumptions affecting the burden of proof: ... (3) If there was at that time 0.08 percent or more, by weight, of alcohol in the person’s blood, it *shall* be presumed that the person was under the influence of an alcoholic beverage at the time of the alleged offense.” Calif. Veh. Code § 23610(a)(3) (1999) (emphasis added).

18, 282 P.3d 446. Despite this admission, the Court then went on to find that “the trial judge still has a duty to instruct the jury on this general principle of law pertaining to a prosecution under (A)(1) once evidence is introduced of the defendant’s alcohol concentration.” *Id.*

However, our courts have long held that it is not “the duty of the court on its own motion to take notice of all questions directly or collaterally involved and to instruct the jury thereon.” *Tipton v. Burson*, 73 Ariz. 144, 150, 238 P.2d 1098, 1102 (1951). A permissive presumption - one that a court may depart from without violating a statutory grant of authority - is not a “general principle of law” on which the trial judge must instruct the jury. Nevertheless, the Court of Appeals claimed the presumption is a “general principle of law” in order to reach its desired result.

In many, if not most DUI cases, the state charges the defendant with a violation of both A.R.S. §28-1381(A)(1) and (A)(2). Consequently, evidence of a defendant’s breath alcohol concentration will be admitted to prove a necessary element of the (A)(2) *per se* DUI offense. Contrary to the Court of Appeals’ implication, the state does not always admit the defendant’s alcohol concentration to take advantage of the statutory presumption. Indeed, when the defendant is charged with both an (A)(1) impairment DUI and an (A)(2) *per se* DUI, the admission of the alcohol concentration is only necessary to prove the *per se* DUI.



When the state chooses to prove impairment with evidence other than a 0.08 or greater alcohol concentration, the alcohol concentration evidence is collateral to the impairment DUI prosecution, unless the state elects to take advantage of the statutory presumption to prove the impairment DUI as well. Requiring the trial judge to instruct the jury about statutory presumptions regardless of the parties' requests violates the plain language of the statute and effectively demands that the parties present a "battle of the experts" that will increase the time and expense of DUI trials throughout the state.

**B. The Court of Appeals erred in holding that general partition ratio and physiological evidence is admissible to rebut the statutory presumption.**

The Court of Appeals further held that a defendant may offer general partition ratio evidence and evidence of the possible effect on breath tests of hematocrit, breathing patterns, and breath or body temperature to rebut the presumption. *Cooperman*, 230 Ariz. at ¶ 25, 30, 282 P.3d 446, 453-54. This allows a defendant to call a criminalist or other expert witness to testify about partition ratios and a myriad of physiological factors that may not apply to the defendant. The state must then proffer its own expert testimony to challenge this evidence. Therefore, by holding that the § 28-1381(G) presumptions are mandatory every time the state admits breath alcohol concentration evidence, the Court of Appeals has opened the door to a battle of experts in most DUI cases. When the defendant's rebuttal evidence is only general evidence and not specific

to the defendant's physiology, it does not meet the Rule 403 balancing test for admission of evidence.

Rule 403 of the Arizona Rules of Evidence requires a court balance the evidence's probative value with a danger that the evidence may, among other factors, confuse the issues or mislead the jury. In support of its decision that general partition ratio is admissible to rebut the statutory presumption, the Court of Appeals relied heavily on a Vermont case, *State v. Hanks*, 772 A.2d 1087 (Vt. 2001), which is distinguishable from the instant matter. First, the state charged the defendant with impairment DUI only. *Id.* at 1088. He was not charged with *per se* DUI. Therefore, the alcohol concentration evidence was not admitted to prove a necessary element of a charged offense. Second, the prosecutor expressly requested the statutory inference of impairment. *Id.* at 1088. Here, the state did not.

Moreover, the Court of Appeals adopted the *Hanks* court's finding that general rebuttal evidence is "not highly probative" on the question of the accuracy of the defendant's alcohol concentration or impairment, but nonetheless found it admissible because the risk of jury confusion was minimal. *Cooperman*, 230 Ariz. at ¶ 23, 282 P.3d at 453, citing *Hanks*, 772 A.2d at 1092. Because the defendant in *Hanks* was only charged with impairment DUI, the risk of jury confusion was lower than the typical Arizona DUI case in which the defendant is charged with both a *per se* DUI and an impairment DUI. In a typical Arizona DUI case, the

evidence will not be admissible to rebut an (A)(2) offense, but will be admissible to rebut a permissive presumption that the defendant was impaired. *Guthrie v. Jones*, 202 Ariz. 273, 277, 43 P.3d 601, 605 (App. 2002). This increases the risk that a jury will be misled or confused by general partition ratio or physiological evidence. Because the probative value of the general evidence is low and the risk of jury confusion is high in an (A)(1) and (A)(2) prosecution, the Rule 403 balance inevitably falls toward exclusion of the evidence. Consequently, the Court of Appeals erred in finding that general evidence about partition ratios and physiological variables is admissible in this case or any (A)(1) and (A)(2) prosecution.

### **III. CONCLUSION**

APAAC respectfully urges this Court to accept jurisdiction of the State's Petition for Review and grant relief. The Court of Appeals' erroneous interpretation of A.R.S. § 28-1381(G) will have a significant impact on the criminal justice system, leading to a waste of judicial and prosecutorial resources.

RESPECTFULLY SUBMITTED this 30th day of October, 2012.

By: /s/ Faith C. Klepper  
Elizabeth Ortiz, #012838  
Executive Director  
Faith C. Klepper, #018444  
Arizona Prosecuting Attorneys'  
Advisory Council  
Attorneys for Amicus Curiae

## **CERTIFICATE OF SERVICE**

The original and seven copies of APAAC's *Amicus Curiae* Brief were delivered for filing with the Clerk of the Arizona Supreme Court on October 30, 2012; and copies of this Brief were mailed or emailed on the same date to:

Stephen Neimiec  
Assistant City Public Defender  
Tucson City Public Defender  
103 E. Alameda - Suite 601  
Tucson, AZ 85701

Baird S. Greene  
Deputy City Attorney  
William F. Mills  
Tucson City Attorney  
P.O. Box 27210  
Tucson, AZ 85726-7210

DATED this 30th day of October, 2012.

By: /s/ Faith C. Klepper  
ELIZABETH ORTIZ, #012838  
Executive Director  
Faith C. Klepper, #018444  
Arizona Prosecuting Attorneys'  
Advisory Council  
Attorneys for Amicus Curiae

## **CERTIFICATE OF COMPLIANCE**

Under Rule 6(c) and Rule 23(c) of the Arizona Rules of Civil Appellate Procedure, I certify that the attached Brief uses proportionately spaced type of 14 points or more, is double-spaced using a roman font, and contains 2,501 words.

DATED this 30th day of October, 2012.

By: /s/ Faith C. Klepper  
ELIZABETH ORTIZ, #012838  
Executive Director  
Faith C. Klepper, #018444  
Arizona Prosecuting Attorneys'  
Advisory Council  
Attorneys for Amicus Curiae